BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER BENEFIT DECISION NO. 6746 AND FORMER RULING DECISION NO. 139 AS PRECEDENT DECISIONS UNDER SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE.

In the Matter of:

ERNEST D. COLLINGSWORTH
(Claimant-Respondent)

S.S.A. No.

PACIFIC PLANT PROTECTION
(Employer-Appellant)

Employer Account No.

PRECEDENT BENEFIT DECISION No. P-B-216

FORMERLY BENEFIT DECISION No. 6746

FORMERLY RULING DECISION No. 139

The employer appealed from Referee's Decision Nos. BK-R-9703 (Case No. 139) and BK-9383 (Case No. 6746) which held respectively that the employer's account was chargeable in the amount of $550 under section 1030.5 of the Unemployment Insurance Code; and that the claimant was not disqualified under section 1256 of the code, and that the employer's account was not relieved of charges under section 1032 of the code. The cases are consolidated for decision under section 5071, Title 22 of the California Administrative Code.

STATEMENT OF FACTS

The claimant was last employed by the employer herein as a guard at the establishment of one of its clients. He commenced his employment on February 20, 1963, and last worked on May 21, 1963. On the last mentioned date he became ill while at work and called the employer's office for a relief guard. The employer

sent a guard to relieve the claimant at about 10:45 a.m. on May 21, 1963. At that time the claimant was not aware of the nature of his illness.

The claimant was unable to make an appointment with his doctor until May 22, 1963. He was then hospitalized for tests and it was determined that he had suffered a heart attack. He filed a claim for disability benefits. In response to a request for information by the disability division of the department, the employer stated that the claimant had left his work on May 21, 1963 because of illness.

The claimant was able to perform his work on October 17, 1963 and went to the employer's establishment to give notice that he was ready to return to work. He was told that he had been replaced but that he would be re-employed when an opening occurred. The claimant then filed a claim for unemployment insurance benefits effective October 20, 1963. His weekly benefit amount was determined to be $55. The claimant indicated on his claim form that he had left his work because "Had a heart attack at work." A copy of the claim form was mailed to the employer which duly responded thereon:

> "This man walked off the job. Upon checking we found his old boss had called him back to work. We never knew he was sick and he never called us."

The employer also indicated on the form that the claimant had last worked on May 31, 1963.

In view of the conflict between the claimant's statement and that of the employer, the department conducted an investigation. A departmental representative was informed on November 5, 1963 by two officials of the employer that the claimant had walked off the job without notifying them. One of these officials stated that he had called the claimant's wife and that she had informed him that the claimant had returned to a former employer. Later, this same official reported to the department that he had talked to another official who informed him that the claimant had been relieved from duty because of illness on May 21, 1963; that he had promised to return to work on May 25, 1963 and had not

done so. The employer's official gave this as the reason for stating that the claimant had walked off the job without notifying them.

At the hearing herein, it developed that the claimant had not had a telephone in his home since March 1963. An official of the employer testified that he had visited the claimant at his home on May 22, 1963; that the claimant and his wife were dressed; and that the claimant had stated he was feeling better and would return to work on May 25, 1963. This official, who was a supervisor of the claimant, had assumed that the claimant had reported to work on May 25, 1963. He learned, however, on May 29, 1963, that the claimant had not. Witnesses for the employer testified that the claimant had not called in after May 21, 1963, to report his continued illness.

The claimant and his wife testified that his supervisor had visited their home only once; that this occurred no earlier than the first part of June 1963; that the claimant had informed the supervisor that he had suffered a heart attack; and that he could not estimate when he would be able to return to work. The claimant testified that he had called the employer's office to report his continued illness before the visit by the supervisor; he estimated that this call occurred on May 29, 1963. The claimant's wife corroborated the claimant's testimony. She further testified that the supervisor's visit occurred early in the morning and that she was still in her nightclothes.

The claimant could not identify the supervisor with whom he allegedly talked on May 29, 1963. However, the employer's practice was to rotate its personnel so that no one particular person would be receiving calls regularly.

The employer contends that it did not wilfully make a false statement or wilfully fail to report a material fact. It further contends that:

> ". . . material aspects of a claimants' (sic) testimony being corroborated by a claimants (sic) spouse should not be a factor in the determination of a ruling."

Additionally, the employer contends that the claimant's employment was terminated because he failed to perform his duties on May 25, 27, 28 and 29, 1963 after informing his supervisor that he was feeling alright and would be on the job on May 25, 1963 unless he advised to the contrary.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides for the disqualification of a claimant who has voluntarily left his most recent work without good cause or who has been discharged for misconduct connected with such work. Section 1032 of the code provides that the employer's account may be relieved of charges under such circumstances.

The employer's statement on the claim form is to the effect that the claimant voluntarily left his work on May 31, 1963. Later, the employer contended that the claimant was discharged because of unreported absence from his work commencing May 25, 1963. We must, therefore, first determine whether we are concerned with a voluntary leaving of work or a discharge. When the claimant left his work, he did so with permission because of illness. When he recovered, he reported back to the employer ready to work. At that time he was told that he had been replaced. It is apparent, therefore, that the claimant did not intend to terminate the employment relationship but that this was accomplished by the employer. Accordingly, we hold that the claimant was discharged (Benefit Decision No. 6469).

The next issue for our consideration is whether the discharge was for misconduct within the meaning of section 1256 of the code. But before proceeding with this, we should consider the employer's contention concerning the testimony given by the claimant's wife. There is nothing in the Unemployment Insurance Code which forbids a wife to testify for her husband, either with respect to a determination of eligibility or a ruling. Section 1881(1) of the Code of Civil Procedure (repealed - now partially incorporated in Evidence Code 970-973) provides that a wife cannot be examined for or against her husband without his consent. But in this case the claimant consented, in fact requested, that his wife testify for him. It is only necessary that her testimony be weighed with all of the other evidence of record. It is apparent that the referee,

who had the opportunity to observe the witnesses, assigned greater weight to the testimony in behalf of the claimant. In our opinion, the referee's findings are not against the weight of the evidence (Benefit Decision No. 5479). We therefore conclude that the claimant was absent from his work because of illness; that he properly notified the employer of his absence; that the claimant's supervisor did not visit the claimant until some time after May 31, 1963; and that the employer discharged the claimant for reasons other than misconduct within the meaning of sections 1030 and 1256 of the code.

Section 1030.5 of the code provides:

> "1030.5. If the director finds that any employer or any employee, officer, or agent of any employer, in submitting facts pursuant to Section 1030 or 3701, wilfully makes a false statement or representation or wilfully fails to report a material fact concerning the termination of a claimant's employment, the director shall make a determination thereon charging the employer's reserve account not less than 2 nor more than 10 times the weekly benefit amount of such claimant. The director shall give notice to the employer of a determination under this section. Appeals may be taken from said determinations in the same manner as appeals from determinations on benefit claims."

Section 1257 of the code provides in pertinent part:

> "1257. An individual is also disqualified for unemployment compensation benefits if:
>
> "(a) He wilfully made a false statement or representation or wilfully failed to report a material fact to obtain any unemployment compensation benefits under this division."

We have not until now been called upon to interpret the provisions of section 1030.5 of the code. But, upon consideration, we are of the opinion that the words,

". . . wilfully makes a false statement or representation or wilfully fails to report a material fact . . ." in section 1030.5 require the same interpretation as the same words in section 1257(a) of the code.

> ". . . Where words and phrases employed in a new statute have been construed by courts as having been used in a particular sense in a former statute on the same subject or one analogous to it, they are presumed, in the absence of a clearly expressed intention to the contrary, to have been used in the same sense in the new statute." (Dalton v. Leland, 22 C.A. 481, 135 P. 54; 45 Cal. Jur. 2d 616)

The legislature was, of course, aware of the language used in code section 1257(a) when it added section 1030.5 to the code. It must be presumed that the legislature was also aware of the court decisions interpreting the word "wilful" and our numerous decisions interpreting the language in code section 1257(a) which has been in effect for many years. If the legislature had desired a different interpretation of section 1030.5, it could readily have accomplished this by using other language to express its intent.

In Benefit Decision No. 5730 we considered the situation in which a claimant had performed services for a law firm serving summonses and complaints. During a 19-week period he had completed 13 services. To accomplish this, he worked a varying number of hours per week; in one instance he worked over 50 hours to complete a service. He did not report his work or earnings to the department when claiming benefits for two reasons: (1) He knew that he was entitled to earn $3 per week without affecting his benefit amount (this was true in 1949 and 1950); (2) he did not think it was necessary to report his work and earnings as he felt it would only confuse everything.

In determining that the claimant was subject to disqualification, we adopted the following definition of the term "wilful":

> "'To do a thing with deliberation is to do it after consideration and reflection, and if after indulging in this mental process, the act is done as a result thereof,

it is wilful.' (People v. Sheldon (1886), 68 Cal. 434, 9 Pac. 457.

"'To do a thing wilfully is to do it knowingly.' People v. Calvert (1928), 93 Cal. App. 568, 269 Pac. 969.

"'Conscious; knowing; done with stubborn purpose but not with malice.' Helme v. Great Western Milling Co., 43 Cal. App. 316, 185 Pac. 510, 512."

We also stated:

"In the instant case, the claimant's failure to report the aforementioned facts was his belief that it would only 'confuse everything.' Under the aforementioned definitions we can reach no other conclusion but that the claimant's failure to disclose these facts was wilful. As to the materiality of the information which the claimant withheld, it is our opinion that the application of the disqualifying provisions of Section 58(a)(3) of the Act (now section 1257(a) of the code) is not dependent upon whether the information withheld would have necessarily resulted in ineligibility or disqualification for benefits under other appropriate sections of the Act. It is sufficient if the claimant believed, or should have known, that the facts withheld would raise a question as to his entitlement to benefits, and clearly the claimant in the instant case entertained such a belief. The claimant's failure to report these facts to the Department, prevented the Department from properly performing its statutory obligation of determining the claimant's eligibility for benefits and constituted a wilful withholding of material facts to obtain benefits. . . ."

In Benefit Decision No. 6490, the claimant, a fisherman, had difficulty in expressing himself and in understanding the English language. He was under the impression that he was entitled to benefits if he did not catch any fish. Therefore, he did not inform the department that he had been fishing when he claimed

benefits for a week in which he had caught no fish. We held that he was subject to disqualification under section 1257(a) of the code on the ground that he had wilfully withheld material facts from the department.

We have held that a claimant is not subject to disqualification under section 1257(a) of the code where he fails to reveal complete information because of a simple error (Benefit Decisions Nos. 5904 and 6387). However, where a claimant, who was unable to read or write, entrusted a friend to complete a claim form and the fact that he had received vacation pay was not revealed, we held that he was subject to disqualification under section 1257(a) of the code(Benefit Decision No. 6507).

We are convinced by the record in the present case that the employer's failure to submit complete and correct information to the department was not the result of simple mistake or negligence. The employer knew that the claimant had left work on May 21, 1963 because of illness but did not reveal this to the department in its initial statement; nor was this information elicited from the employer until the department had conducted an extensive investigation. The employer contended that the claimant had been discharged but merely stated initially that the claimant had walked off the job. The employer knew that the claimant had been ill but stated on the claim form, "We never knew he was sick and he never called us." (Emphasis added) All of the circumstances surrounding the termination of the claimant's employment were material to a determination of the claimant's eligibility for benefits and to a ruling under code sections 1030 and 1032; and the employer was obligated to inform the department of them. It was the department's duty to determine the claimant's eligibility for benefits and to issue a ruling after consideration of all of the facts, and it was not within the province of the employer to decide which facts were controlling.

Although the material information may have been withheld and the false statements may have been made because of lack of co-ordination between various officials and employees of the employer, this was the responsibility of the employer. The claimant had reported his illness to employees who had been given

the responsibility of receiving such reports. The department, in its investigation, had dealt with responsible employees of the employer. Under section 1030.5 specifically, and under the law of agency generally, the employer was bound by the acts or omissions of these employees (Benefit Decision No. 6507).

We are not concerned with the question whether the employer intended to defraud the claimant by inducing the department to deny benefits or to defraud the benefit fund by attempting to avoid charges to its account. Section 1030.5 of the code does not mention "intent" and any charges imposed under such section need not rest upon the intent of the employer to defraud or seek a position to its advantage.

In view of the above, we conclude that the employer's account shall be charged in the amount of $550 under section 1030.5 of the code.

DECISION

The decision of the referee is affirmed. Benefits are payable if the claimant was otherwise eligible and the employer's account is not relieved of charges under section 1032 of the code (Case No. 6746). The employer's account is charged with $550 under section 1030.5 of the code (Case No. 139).

Sacramento, California, February 5, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

HARRY K. GRAFE

DISSENTING OPINION

I dissent.

This case discusses a rule of evidence which is no longer a part of California law; interprets as a matter of first impression section 1030.5 of the Unemployment Insurance Code, which has been the subject of a Precedent Decision since 1968 without the hint of any necessity for further precedential interpretation; and, sets forth a new composite definition of "wilful" which differs from that set forth in Appeals Board Decision No. P-B-72, although the latter has served well since 1970 without any clamor for change or modification.

The third paragraph of the Reasons for Decision discusses the spousal privilege formerly contained in section 1881(1) of the Code of Civil Procedure. Section 1881(1) was repealed when the California Evidence Code was adopted (Ch. 299, Stats. 1965, operative January 1, 1967). The privilege not to testify against a spouse, formerly contained in said section, was transferred to sections 970-973 of the Evidence Code. But the privilege of a spouse not to testify <u>for</u> the other spouse, as is discussed in the majority opinion, was expressly abolished by the California Law Revision Commission in its drafting of the code and by the Legislature in its enactment of the new law. As the official Law Revision Commission Comment points out, there simply was no need for the privilege:

> "If a case can be imagined in which a party would wish to avail himself of this privilege, he could achieve the same result by simply not calling his spouse to the stand."

By selecting the instant case as a Precedent, my colleagues thus give new life to a provision of law that was wiped off the books a decade ago as being unneeded.

In the final paragraph on page five of the majority opinion, there is made the boldface statement that: "We have not until now been called upon to interpret the provisions of section 1030.5 of the code." Such statement, of course, is not true. Section 1030.5 was the

subject to a thoughtful and thorough interpretation in Appeals Board Decision No. P-B-29, adopted on October 29, 1968. In the considerable time that has passed since that date, there has been no indication that the interpretation set forth in Appeals Board Decision No. P-B-29 is vested with any serious shortcomings, or is in any manner erroneous, or is in need of revision.

Similar comments can be made with regard to the definition of "wilful." In Appeals Board Decision No. P-B-72, adopted on May 5, 1970, the Board established a composite definition of the term "wilful," which has been followed and applied since without any compulsion being offered for change. Yet, the reader who compares the majority opinion here with the composite definition set forth in Appeals Board Decision No. P-B-72 will discover that the two are not exactly the same.

I believe it is noteworthy that the Boards which adopted Appeals Board Decisions Nos. P-B-29 and P-B-72 cited a number of Benefit Decisions in support of their holdings, and must be presumed to have been aware of the existence of Benefit Decision No. 6746, yet chose not to include it. As their judgements have been shown, by the passage of time, to have been free of error, I can perceive no good reason to raise Benefit Decision No. 6746 to precedent status at this late date. I suggest that such action is tantamount to a "rule without reason" and can only have the effect of causing undue confusion and unnecessary complication to those who must use and be bound by the Board's Precedent Decisions.

HARRY K. GRAFE